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# THE *ENRICA LEXIE* AND *ST ANTONY*: A VOYAGE INTO JURISDICTIONAL CONFLICT

DANIELLE IRELAND-PIPER\*

*The decision of the Supreme Court of India in Republic of Italy v Union of India illustrates the legal and diplomatic complexities that can arise when nations, and states within those nations, have competing claims to jurisdiction over the prosecution of criminal offences. In our increasingly interconnected world, competing claims to jurisdiction are more likely. The decision, among other things, is concerned with legal aspects of coastal state jurisdiction in a federal system and sovereign immunity under international law. This decision is of interest because Australia, like India, is a coastal nation that divides power between federal and state governments. This case note sets out the factual background and legal frameworks that gave rise to the decision, considers the arguments made by each of the parties before the Supreme Court, and summarises the findings of the two presiding Judges. It then seeks to understand the relevance of the decision and any lessons that can be taken from it.*

## I INTRODUCTION

The decision in *Republic of Italy v Union of India* ('*Indian Fishermen Case*')<sup>1</sup> by the Supreme Court of India dealt with legal aspects of coastal state jurisdiction and sovereign immunity under international law. In so doing, it illustrates the legal and diplomatic complexities that can arise where nations assert competing claims to jurisdiction.

The decision concerned an incident between the *M V Enrica Lexie*, an Italian merchant vessel, and the *St Antony*, an Indian fishing boat. On board the *M V Enrica Lexie* were members of the Italian Armed Forces ('*marines*'), authorised by Italian law to deploy on the vessel to protect it from pirate attacks. On 15 February 2012, two of the marines are alleged to have mistaken the *St Antony* for a pirate vessel and opened fire. The shots fired are alleged to have caused the death of Valetine Jelastine and Ajeesh Pink, two Indian fishermen on board the *St Antony* ('*fishermen*'). The incident took place at a distance of about 20.5 nautical miles from the coastline of the State of Kerala ('*Kerala*'), a unit within the federal Union of India ('*India*'). The *M V Enrica Lexie* was flying the Italian flag. The *St Antony* was registered as an Indian vessel, but was not flying the Indian flag at the time of the incident. The Republic of Italy ('*Italy*') and Kerala

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<sup>1</sup> Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No 135 of 2012.

each commenced criminal proceedings against the marines under their respective domestic laws.

At the time of writing, the case is ongoing and the circumstances surrounding it are still the subject of media coverage.<sup>2</sup> Nonetheless, the decision by the Supreme Court remains relevant and instructive because of the findings on jurisdiction and the questions of international law it raises, some of which may be the subject of debate among both practitioners and academics. As M Ghandi observes, if the:

[L]egal issues relating to the Enrica Lexis incident, including extraterritorial jurisdiction, are taken before an international adjudicatory forum, a different decision could emerge given that the subject matter of the dispute involves certain grey areas of international law.<sup>3</sup>

The decision is complex and required the Supreme Court to consider Italian law, Indian law, Kerala's state law, the *United Nations Convention on the Law of the Sea* ('UNCLOS'),<sup>4</sup> the decision of the Permanent Court of International Justice in *S S Lotus (France v Turkey)* ('*Lotus Case*')<sup>5</sup> and general principles of international law. The Supreme Court accepted the argument by Italy that Kerala did not have jurisdiction, but rejected Italy's argument that India did not have jurisdiction. It held that the marines should be tried by a Special Court in India.<sup>6</sup> However, the Chief Justice indicated that some of the arguments raised by Italy could be reopened if, as a matter of evidence, it was accepted by the Special Court that the marines had acted on the belief that they were preventing an act of piracy. This was because art 100 UNCLOS requires that '[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State'.

The decision is relevant for two primary reasons. First, it illustrates the complexities that arise in managing jurisdictional conflicts<sup>7</sup> and deciphering the relationship between international and domestic law. In particular, Chelameswar J in his judgment makes observations about the nature of extraterritorial

<sup>2</sup> See, for example, Shubhajit Roy, *Italian Marines Case: Unlike Other Murder Accused, Marines Enjoy Access to Internet, Phones* (27 April 2014) *The Indian Express* (Online) <<http://indianexpress.com/article/india/india-others/the-plight-of-italian-marines-family-visits-cafe-outings/>>; *India Drops Anti-piracy Marine Charges* (24 February 2014) *Al Jazeera* (Online) <<http://www.aljazeera.com/news/asia/2014/02/india-proceed-with-italian-marine-case-201422453431308731.html>>.

<sup>3</sup> Manimuthu Gandhi, 'The Enrica Lexis Incident: Seeing Beyond the Grey Areas of International Law', (2013) 53(1) *Indian Journal of International Law* 1, 25.

<sup>4</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>5</sup> *S S Lotus (France v Turkey)* (Judgment) [1927] PCIJ (ser A) No 10.

<sup>6</sup> Under the *Special Courts Act 1979*, cases in India involving persons of high public or political office can be transferred to a Special Court. A Special Court consists of a sitting Judge of a High Court nominated by the Chief Justice of the High Court within the local limits of the jurisdiction in which the Special Court is situated, with the concurrence of the Chief Justice of India.

<sup>7</sup> See, for example, the discussion in Danielle Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?' (2012) 13(1) *Melbourne Journal of International Law* 122, 125.

jurisdiction. Second, Australian jurisprudence could benefit from a deeper understanding of Indian jurisprudence. As Michael Kirby has observed:

Australian lawyers do not know enough about India. I warrant that the opposite is also true ... The neglect by Indian and Australian lawyers of each other is as tragic as it is puzzling. It is tragic because it represents a lost opportunity for two common law countries, which are federations, which live by the rule of law, which are governed under democratic, parliamentary constitutions and which, in their different ways, protect fundamental human rights and basic freedoms ... [B]etween India and Australia there are so many links of concept and legal theory that we owe it to each other to become more familiar with relevant fields of jurisprudence so that we may take advantage of the experience which each has to offer.<sup>8</sup>

This case note sets out the factual background and legal frameworks that gave rise to the decision in the *Indian Fishermen Case*, considers the arguments made by each of the parties before the Supreme Court, and summarises the findings of the two presiding Judges. It then seeks to understand the relevance of the decision and any lessons that can be learned from it.

## II BACKGROUND

### A *Factual context*

The facts leading up to the criminal proceedings against the Italian marines in respect of the deaths of the Indian fishermen are outlined at the start of this case note. In May 2012, Kerala State Police filed charges against the marines under ss 302, 307 and 437, read with s 34, of the *Indian Penal Code* ('IPC') and s 3 of the *Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act* ('SUA'). Italy also commenced criminal proceedings against the marines under Italian law.

In March 2012, the Italian Consul General filed a writ petition on behalf of Italy claiming that, because the marines had acted in an official capacity, Italy had exclusive jurisdiction and could claim sovereign immunity.<sup>9</sup> Italy sought a declaration that any criminal proceedings by India or Kerala in relation to the incident would be illegal and ultra vires arts 14 and 21 of the *Constitution of India*. Article 14 requires India to give all persons equal protection before the law. Article 21 prevents India from depriving any person of their liberty, except according to law. Italy also sought the release of the marines into its custody.

In May 2012, the Kerala High Court declined to make such a declaration and rejected Italy's argument that it had exclusive jurisdiction. Instead, the Court found that Kerala had jurisdiction up to 200 nautical miles from the Indian coast. In turn, Italy lodged a writ in the Supreme Court of India appealing the decision. The arguments made by Italy and India are set out below. Before moving to the

<sup>8</sup> Michael Kirby, 'India & Australia: A Neglected Legal Relationship and a Plan of Action' (Paper presented at Indo Australian Public Policy Conference, New Delhi, India, 23-24 October 1996).

<sup>9</sup> From enquiries made of a practitioner and academic in India, it appears that Italy had standing in the matter because of the sovereign immunity arguments made.

legal arguments, it is worth noting the socio-political context in which the case has unfolded.

### *B Socio-political context*

The competing claims to jurisdiction between India and Italy has caused tension between the two nations and attracted the ‘attention of the press, public and politicians’,<sup>10</sup> with media reports describing the competing claims as a ‘diplomatic crisis’.<sup>11</sup> The subtext of the media reporting reveals an inherent suspicion by each nation of the other’s legal system, and a sense in some sections of the Indian public that the Italian government does not take seriously the death of the two Indian fishermen. From the Italian perspective, concerns have been expressed as to the conditions in which the marines are detained, the nature of the charges they will face, and whether or not the death penalty will apply. As Gandhi asks, ‘[c]ould the entire process leading to the trial of the Italian Marines in India be criticised as a wasteful exercise that only facilitated the straining of the relations between two otherwise friendly countries?’<sup>12</sup> He goes on to suggest that:

Law has its own limitations in settling disputes in an adversarial setting. Yet, diplomacy can work towards finding an acceptable solution where both Italy and India can mutually benefit ... Where the limits of the law are exhausted, it is for the [sic] diplomacy to mend friendly relations so that desired results may be achieved.<sup>13</sup>

Although this is not the first time that fishermen have been killed by anti-piracy forces,<sup>14</sup> it is the first time such an incident has been the subject of so much public and judicial scrutiny. In this context, it is likely that senior officials from both countries are under domestic pressure to appear strong in responding to the issues arising out of the incident. Setting aside the question of the limitations of the law in furthering international relations, which is beyond the scope of this short case note, the respective legal arguments made by Italy and India are now considered.

## III ARGUMENTS BEFORE THE SUPREME COURT OF INDIA

<sup>10</sup> Dilip Rao, *Italian Marines v Union of India* (17 March 2013) The Bar <<http://centreright.in/2013/03/italian-marines-v-union-of-india/>>.

<sup>11</sup> *Italy and India in Diplomatic Crisis* (15 May 2013) Asia Sentinel <<http://www.asiasentinel.com/politics/italy-and-india-in-diplomatic-crisis/>>.

<sup>12</sup> Gandhi, above n 3, 25.

<sup>13</sup> Ibid.

<sup>14</sup> A 2012 media report suggests that:

*At least eight fishermen from India and Yemen have been killed since 2008 by soldiers assigned to deter pirates or by guards responsible for keeping ship cargos and crews safe, according to government documents. Another Indian fisherman died in July when sailors on the USNS Rappahannock, a U.S. naval supply ship, opened fire on a vessel off the coast of Dubai.*

Alan Katz, *Brother Shot Dead Fishing Tests Armed Guards* (29 November 2012) Accountability - Bloomberg News (Online) <<http://www.bloomberg.com/news/2012-11-29/brother-shot-dead-fishing-tests-armed-guards-accountability.html>>.

### *A Italy*

The arguments made by Italy centred on three key themes:

1. The incident occurred between two nation-states, so the state of Kerala had no jurisdiction.
2. The incident occurred in a place where India has sovereign rights, not sovereignty, and therefore, any assertion of jurisdiction by India was contrary to *UNCLOS* and general principles of international law.
3. The marines were carrying out official functions, and therefore, Italy had exclusive jurisdiction.

These three key themes are explored in further detail below.

#### *1. Kerala had no jurisdiction*

Italy argued that, as the incident occurred between two nation-states, it was governed by principles of international law, including comity and sovereign equality between nation-states. It further argued that, where the conduct of another nation is concerned, only a central federal level of government can take any action. It also argued that India's sovereign rights in relation to its relationship with Italy were not able to be delegated to the state government of Kerala because no legal relationship exists between Italy and Kerala.<sup>15</sup> This argument may interest nation who adopt a federal system of governance, such as Australia, the United States and Canada, particularly as state governments in those nations have direct trade and tourism relationships with other countries and varying degrees of autonomy from federal decision-making. However, the most complex and comprehensive argument made by Italy was that India had no jurisdiction.

#### *2. India had no jurisdiction*

By way of background, under *UNCLOS*, the maritime areas adjacent to a nation-state are divided into three key zones: the territorial waters up to 12 nautical miles, the contiguous zone up to 24 nautical miles, and the exclusive economic zone ('EEZ') up to 200 nautical miles. Nations have varying rights in the three zones. Beyond the zones are the high seas, over which no nation can assert sovereignty. As noted at the outset, the incident occurred approximately 20.5 nautical miles from the coast of India, and so outside its territorial waters, but within its contiguous zone and EEZ. Section 188A of the *Indian Code of Criminal Procedure* ('CCrP'), in conjunction with s 7(7) of the *Maritime Zones Act 1976* ('MZA'), provides that when an offence is committed by any person in India's EEZ, that person may be dealt with in any place in which he is found or in any other place as the central government of India may direct.<sup>16</sup>

<sup>15</sup> *Indian Fishermen Case*, Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No 135 of 2012, 14-15 [14]-[15].

<sup>16</sup> In 1981, India extended s 188A *CCrP* to the EEZ pursuant to s 7(7) *MZA*.

Italy argued that because the incident occurred outside territorial waters, but within the contiguous zone and EEZ, it occurred in a place where the central government of India had sovereign rights, but not sovereignty. It further argued that the sovereign rights were limited by *UNCLOS* to issues such as immigration, customs, trafficking, and exploration, protection and exploitation of natural resources,<sup>17</sup> but did not extend to the incident in question. Rather, under *UNCLOS*, Italy, as the flag state of the *M V Enrica Lexie*, had a pre-emptive right to try the marines, and an assertion of jurisdiction by India would negate the right of innocent passage.<sup>18</sup> However, this latter point was either confused in translation or misconceived, because the right of innocent passage applies only in territorial waters and is a more restricted right for vessels, than is the freedom of navigation which applies in the EEZ. In any event, Italy argued that s 188A was inconsistent *UNCLOS*.

To address the inconsistency, Italy argued that, according to the law of India, once a convention is ratified, the domestic law on similar issues should be construed in harmony with the convention, unless there is express provisions to the contrary.<sup>19</sup> Further, any principle of concurrent jurisdiction that may otherwise have been recognised as part of public international law is displaced by the express provisions of *UNCLOS*.<sup>20</sup> Italy argued that India is bound by *UNCLOS*, and that *UNCLOS* recognises the primacy of flag state jurisdiction. Also, whilst acknowledging that the 'permissive' approach to jurisdiction taken in the *Lotus Case*<sup>21</sup> continues to be good law, Italy argued there was an exception to the extent

<sup>17</sup> *Indian Fishermen Case*, Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No 135 of 2012, 40 [45]. *UNCLOS* art 56 provides:

56. Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:
  - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
  - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
    - (i) the establishment and use of artificial islands, installations and structures;
    - (ii) marine scientific research;
    - (iii) the protection and preservation of the marine environment;
  - (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with.

<sup>18</sup> *UNCLOS* arts 17, 58(1), 87.

<sup>19</sup> Italy cited *Maganbhai Ishwarbhai Patel v Union of India* (1970) 3 SCC 400 as authority for the proposition that unless there is a law in conflict with the treaty, a treaty must stand, and the decision in *Vishaka and Others v State of Rajasthan* (1997) 6 SCC 241 as authority for proposition that international conventions and norms are to be read into constitutional rights that are absent in domestic law, so long as there is no inconsistency with such domestic law.

<sup>20</sup> *UNCLOS* arts 91-92, 94, 97.

<sup>21</sup> The decision of the Permanent Court of International Justice in the *Lotus Case* recognised a presumption in favour extraterritoriality, in the absence of any prohibitive rule, stating:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts

the approach is overridden by art 97 *UNCLOS*. Article 97 provides that in the event of a collision or any other incident of navigation concerning a ship on the high seas, no penal or disciplinary proceedings may be instituted against a person except before a judicial or administrative authority either of the flag state or the nation-state of which the a person is a national.<sup>22</sup> Therefore, Italy argued that it had the pre-emptive and exclusive jurisdiction to try the marines.

### 3. *Italy had exclusive jurisdiction*

To further support its argument of exclusive jurisdiction, Italy referred the Court to a *note verbale* issued by the Embassy of Italy in New Delhi.<sup>23</sup> This document asserted the conduct of the marines had ‘been carried out in the fulfilment of their official duties in accordance with national regulations’ and ‘reassert[ed] the Italian jurisdiction in respect of the said military personnel’ on the basis that ‘the conduct of Italian Navy Military Personnel officially acting in the performance of their duties should not be open to judgment or scrutiny in front of any court other than the Italian ones’.

While there were a number of other points raised by Italy, the key ones can be understood in terms of the three themes set out above. India’s response also engaged with these key themes. India’s arguments are considered below.

## *B India*

India considered that the case before the Supreme Court involved two key issues. The first was whether the Indian courts had territorial jurisdiction to try the marines under the *IPC*. The second issue was whether the marines were entitled to claim sovereign immunity. The first issue essentially combines the first and second key themes identified in Italy’s argument, and therefore, is presented as such.

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outside their territory, it leaves them in this respect *a wide measure of discretion which is only limited to certain cases by prohibitive rules*; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

*Lotus Case* (Judgment) [1927] PCIJ (ser A) No 10., 19.

<sup>22</sup> *UNCLOS* art 97 provides:

97. Penal jurisdiction in matters of collision or any other incident of navigation

1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.

3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

<sup>23</sup> Reproduced in the *Indian Fishermen Case*, Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No 135 of 2012, 50-53 [44].



*1 Kerala had jurisdiction*

In responding to Italy's argument that Kerala did not have jurisdiction, India argued that Kerala's courts derived jurisdiction from the *CCrP*, a federal Act of Parliament, which had been extended to the EEZ by the *MZA* as noted above. However, from a reading of the judgment, most of India's arguments focused on the question of the jurisdiction of India as a federal unit.

## 2 *India had jurisdiction*

In responding to Italy's argument that art 97 *UNCLOS* granted jurisdiction over the incident to Italy, India argued that art 97 did not apply to the incident. This was because art 97 expressly refers to collisions or 'any other incident of navigation', and homicides are neither collisions nor incidents of navigation. As to Italy's argument that extension of the *CCrP* to the EEZ by the *MZA* was inconsistent with *UNCLOS*, India argued that it was not inconsistent, and that even if it was, the laws of India prevail over *UNCLOS* in Indian courts. While India conceded that an attempt should be made to harmonise the *MZA* with *UNCLOS*, it argued that, if this was not possible and the provisions conflicted, the *MZA* must prevail. Further, the extension of the *CCrP* to the EEZ by the *MZA* occurred in 1981, before India ratified *UNCLOS* in 1982, and therefore, India argued the extension was not subject to *UNCLOS*. India also argued that art 27 *UNCLOS*<sup>24</sup> was not part of India's domestic law.

Another argument by India was that, in any event, the relevant voyage was not that of the *M V Enrica Lexie*, but rather that of *St Antony*, the Indian boat that the fisherman were on, and therefore, India should have jurisdiction. The offences set out in the *IPC* apply to 'any citizen of India in any place without or beyond India or to any person on any ship or aircraft registered in India, wherever it may be.'

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<sup>24</sup> *UNCLOS* art 27 provides:

27. Criminal jurisdiction on board a foreign ship

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
  - (a) if the consequences of the crime extend to the coastal State;
  - (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
  - (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
  - (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.
2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.
3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate *contact* between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.
4. In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.
5. Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

The word 'offence' was said to include every act committed outside India, which, if committed in India, would constitute an offence.<sup>25</sup>

As noted above, Italy also argued that the incident fell outside the scope of the permissible categories of jurisdiction to which India was entitled, such as those under art 56 *UNCLOS*, including fishing rights and other exploitation of natural resources. In response, India argued that legislation for the purpose of protecting fishing rights would include legislation for the safety and security of Indian fishermen.<sup>26</sup> However, even if it could be assumed that the rights were beyond those indicated in *UNCLOS*, such a conflict would have to be resolved on the basis of equity and in the light of all the circumstances. Even if both Italy and India had jurisdiction, India argued that it was more convenient and appropriate for the trial to be conducted in India, having regard to the location of the incident and nature of the evidence and witnesses.<sup>27</sup> In any event, according to India, art 59 *UNCLOS*,<sup>28</sup> in expressly recognising that there will be circumstances where *UNCLOS* does not resolve all questions of jurisdiction, permits nation-states to assert rights or jurisdiction beyond those specifically provided. It followed, therefore, that Italy's argument on exclusive jurisdiction was not supported by the provisions of *UNCLOS*.<sup>29</sup> India also argued that the *Lotus Case* continued to be good law and that under the passive personality principle, nations may claim jurisdiction to try an individual where actions might have affected nationals of the nation.

### 3 *Italy did not have exclusive jurisdiction*

As to Italy's argument that the actions of the marines were an act of state, and therefore, protected by sovereign immunity, India agreed on the existence of a rule of sovereign immunity, but argued each country is to determine the bounds of such immunity for itself. Given that the relevant provisions in the *IPC* begin with the words 'every person', under Indian law all offenders are punishable. India supported this point by reference to the fact that it does not adopt any policy of giving immunity to foreign armed forces under status-of-force agreements. In any event, India argued that the actions of the marines were not *acta jure imperii*, the public acts of a nation-state, but instead were *acta res gestionis*, activities of a commercial nature that are not immune from the jurisdiction of local courts. This was a difficult argument to make given that the marines were acting on the

<sup>25</sup> *Indian Fishermen Case*, Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No 135 of 2012, 67 [59].

<sup>26</sup> *Ibid* 72 [62].

<sup>27</sup> *Ibid* 73 [63].

<sup>28</sup> *UNCLOS* art 59 provides:

59. Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone:

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

<sup>29</sup> *Indian Fishermen Case*, Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No 135 of 2012, 77 [65].

mandate of the Italian Parliament and were not subject to the orders of the Master on the ship.

Kerala was also a respondent in the case, and it argued that its officers were exercising jurisdiction as provided in the *IPC* and *CCrP*. Kerala reiterated India's argument that in the case of conflict between a treaty or a convention and a domestic law, the latter shall always prevail, except in defined circumstances.<sup>30</sup>

#### IV DECISION OF THE SUPREME COURT OF INDIA: THE FINDINGS

Judgment in the *Indian Fishermen Case* was given by two judges, Chief Justice Altamas Kabir and Justice Chelameswar. The findings of each are considered below.

##### A Chief Justice Altamas Kabir

In the view of Kabir CJ, the key issues in the case could be summarised as follows:

Two issues, both relating to jurisdiction, fall for determination in this case. While the first issue concerns the jurisdiction of the Kerala state Police to investigate the incident of shooting of the two Indian fishermen on board their fishing vessel, the second issue, which is wider in its import, in view of the Public International Law, involves the question as to whether the Courts of the Republic of Italy or the Indian Courts have jurisdiction to try the accused.<sup>31</sup>

On the first issue, the question as to whether Kerala had jurisdiction in the matter, Kabir CJ found that it did not. His Honour found that the incident had occurred not within the territorial waters of Kerala, but rather within the contiguous zone, over which Kerala has no jurisdiction.<sup>32</sup> In considering the argument that the extension of s 188A of the *CCrP* to the EEZ vested the Kerala State Police with jurisdiction to investigate the incident, Kabir CJ held as follows:

What, in effect, is the result of such extension is that the Union of India extended the application of the *Indian Penal Code* and the *Code of Criminal Procedure* to the Contiguous Zone, which entitled the Union of India to take cognizance of, investigate and prosecute persons who commit any infraction of the domestic laws within the Contiguous Zone. However, such a power is not vested with the state of Kerala.<sup>33</sup>

Further, in what somewhat resembled deference to the principle of comity, Kabir CJ noted that the marines were from the Royal Italian Navy and were on the *M V Enrica Lexie* pursuant to an Italian Decree of Parliament. Therefore, his Honour observed, the dispute is taken 'to a different level where the government between two countries become involved'.<sup>34</sup> In particular, he observed that as Italy had already commenced proceedings against the marines, Kerala, being merely one

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<sup>30</sup> Ibid 93 [79].

<sup>31</sup> Ibid 96 [82].

<sup>32</sup> Ibid 97 [84].

<sup>33</sup> Ibid 98 [84].

<sup>34</sup> Ibid 100 [86].

state unit in a larger federation, would not have authority to try the accused when outside the state. This seems to be a statement that only the federal central government may assert extraterritorial jurisdiction, and a state may not.

On the second issue, whether the courts of Italy or India had jurisdiction to try the marines, his Honour found that s 7 of the *MZA* makes it clear that the contiguous zone is within the EEZ, an area adjacent to the territorial waters extending up to 200 nautical miles from the nearest point of the baseline of the Kerala coast. Therefore, the laws governing the EEZ also govern incidents occurring within the contiguous zone.<sup>35</sup>

His Honour rejected the argument by Italy that s 7 of the *MZA* was in conflict with arts 33, 56 or 57 *UNCLOS*. Rather, he found the potential area of difference was between the *MZA* and art 97 *UNCLOS*, which relates to penal jurisdiction in matters of collision or any other incident of navigation.<sup>36</sup> In his view, the question then became whether firing at the fishermen was an ‘incident of navigation’. His Honour found that the expression ‘incident of navigation’ cannot be extended to a criminal act ‘in whatever circumstances’.<sup>37</sup> Instead, the issue as to whether the accused had acted on a misunderstanding that the *St Antony* was a pirate vessel, was a matter of evidence to be established at trial. Therefore, art 97 did not apply, and art 100, which provides that all nation-states must cooperate to the fullest possible extent in the repression of piracy on the high seas, or in any other place outside the jurisdiction of any nation, would only apply if a trial court accepted that the accused had acted on that misunderstanding.<sup>38</sup> He rejected the argument by India that *UNCLOS* permits nations to assert rights of jurisdiction beyond those specifically provided in it.<sup>39</sup> However, he did find that:

[W]hile India is entitled both under its Domestic Law and the Public International Law to exercise rights of sovereignty up to 24 nautical miles from the baseline of the basis of which the width of Territorial Waters is measured, it can exercise only sovereign rights within the Exclusive Economic Zone for certain purposes. The incident ... having occurred within the Contiguous Zone, the Union of India is entitled to prosecute the two Italian marines under the criminal justice system.<sup>40</sup>

He further found that such a prosecution ‘has to be conducted only at the level of the Federal or Central Government and cannot be the subject matter of a proceeding initiated by a Provincial/state Government’.<sup>41</sup>

Ultimately, Kabir CJ held that, until it is accepted that the provisions of art 100, relating to cooperation on piracy, apply to the facts of this case, it is India that has jurisdiction to proceed with the investigation and trial. To that end, his Honour directed India, in consultation with the Chief Justice of India, to try the case in a

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<sup>35</sup> Ibid 104 [92].

<sup>36</sup> Ibid 105 [93].

<sup>37</sup> Ibid 108 [94].

<sup>38</sup> Ibid 109 [95].

<sup>39</sup> Ibid 117 [99].

<sup>40</sup> Ibid 118 [100].

<sup>41</sup> Ibid 98 [84].

Special Court in accordance with the law of India and *UNCLOS*, but only where there was no conflict between *UNCLOS* and the domestic laws of India.

### *B Justice Chelameswar*

Chelameswar J, agreeing with the conclusions of Kabir CJ, identified the issue as being the territorial limits of the authority of the sovereign to make laws and enforce them.<sup>42</sup> His Honour noted that art 1 of the *Constitution of India* defines the geographical territory of India and art 297 defines maritime territory. In so doing, his Honour observed a lack of clarity on the extent of territorial waters, stating:

[T]hat the sovereignty of a 'coastal State' extends to its territorial waters, is also a well-accepted principle of International Law, though there is no uniformly shared legal norm establishing the limit of the territorial waters – maritime territory. Whether the maritime territory is also a part of the national territory of the State is a question on which difference of opinion exists.<sup>43</sup>

However, despite defining the parameters of the issues as being territorial, his Honour also acknowledged the issue of extraterritoriality. For example, he referred to article 245(2) of the *Constitution of India*, which expressly declares that '[n]o law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation'. The point Chelameswar J seems to make is that this article functions as a limit on the jurisdiction of the courts to declare a law invalid or to decline to give effect to a law on the grounds that it extends extraterritorially,<sup>44</sup> regardless of competing jurisdictional claims. His Honour then went on to acknowledge why nation States may seek to assert extraterritorial jurisdiction as follows:

The increased complexity of modern life emanating from the advanced technology and travel facilities and the large cross border commerce made it possible to commit crimes whose effects are felt in territories beyond the residential borders of the offenders.<sup>45</sup>

Chelameswar J then considered the relationship between extraterritorial rights and extraterritorial responsibility. For example, his Honour reasoned that if constitutional protections in India apply to non-citizens, it follows that India must also have the authority to legislate extraterritorially. He stated that:

The protection of Articles 14 and 21 of the *Constitution* is available even to an alien when sought to be subjected to the legal process of this country. This court on more than one occasion held so on the ground that the rights emanating from those two Articles are not confined only to or dependent upon the citizenship of this country. As a necessary concomitant, this country ought to have the authority to apply and enforce the laws of this country against the person and things beyond its territory when its legitimate interests are affected. In assertion of such a

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<sup>42</sup> Ibid 125 [3]-[5].

<sup>43</sup> Ibid 128 [8].

<sup>44</sup> Ibid 138-9 [16].

<sup>45</sup> Ibid 139-40 [18].

principle, various laws of this country are made applicable beyond its territory.<sup>46</sup>

Giving examples of various legislative provisions extending extraterritorially, Chelameswar J stated that 'it is amply clear that Parliament always asserted its authority to make laws, which are applicable to persons, who are not corporeally present within the territory of India (whether or not they are citizens) when such persons commit acts which affect the legitimate interests of this country.'<sup>47</sup> His Honour then concluded:

Therefore, I am of the opinion that the Parliament, undoubtedly, has the power to make and apply the law to persons, who are not citizens of India, committing acts, which constitute offences prescribed by the law of this country, irrespective of the fact that the offender is corporeally present or not within the Indian territory at the time of the commission of the offence. At any rate, it is not open for any Municipal Court including this Court to decline to apply the law on the ground that the law is extra-territorial in operation when the language of the enactment clearly extends the application of the law.<sup>48</sup>

What Chelameswar J gives here is a clear statement of the authority of Parliament India to legislate extraterritorially. Other key findings in both judgements and the relevance that they may have to the broader dialogue on extraterritoriality are now considered.

## V BROADER RELEVANCE OF THE ARGUMENTS AND FINDINGS

This case is relevant not merely because of the fascinating convergence of Indian and Italian national agendas or the complicated framework of domestic and international law in which it took place, but also because the decision either makes or illustrates a number of key points.

First, both India and Italy seemed to accept that *Lotus Case* is still good law. This is in the context of considerable academic criticism to the effect that it does not adequately regulate competing claims to jurisdiction or account for any hierarchy of claims. This is so even though India and Italy are not part of any common regional body and do not come from a common legal heritage, India being a common law country and Italy being a civil law country.

Second, the decision and surrounding media reports illustrate the tensions that competing claims to jurisdiction can cause. It underscores the need for clearer guidance on resolving competing claims to jurisdiction and for better articulation of the principles of jurisdiction in international law. The provisions of *UNCLOS* did not necessarily bring any clarity. The closest the Supreme Court of India came to articulating any guidance was to state that '(c)rimes should be dealt with by the States whose social order is most closely affected.'<sup>49</sup> It did not pose any criteria by which such an affect would be measured or compared.

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<sup>46</sup> Ibid 140-141 [19].

<sup>47</sup> Ibid 146 [25].

<sup>48</sup> Ibid 150 [29].

<sup>49</sup> Ibid 115 [98].

Third, for nation-states with an active interest in deterring acts of piracy, the incident in question is a lesson in managing relationships with coastal states whose territory is adjacent to common maritime routes. Concerns about international piracy and European commercial ventures may not carry the same weight with people who do not share common cultures or wealth. Further, findings by the Supreme Court such as that India is entitled to exercise 'rights of sovereignty'<sup>50</sup> over contiguous zones, India has sovereign rights, but not sovereignty, over EEZs,<sup>51</sup> and *UNCLOS* does not permit nations to assert rights of jurisdiction beyond those specifically provided in it,<sup>52</sup> will contribute to the debate on interpretation of articles in *UNCLOS* concerned with jurisdiction and sovereign rights in contiguous zones and EEZs. Notably, a finding by Chelameswar J, that article 97, which is in Part VII *UNCLOS*, applies only to that part of the sea not included in EEZs zone or territorial waters, and has no application to the EEZs,<sup>53</sup> may provokes a reaction from scholars of *UNCLOS*. This is because art 58 expressly provides that arts 88-116, which are also in Part VII, do apply in EEZs, as long as they are not incompatible with Part V.

Fourth, the decision and the incident itself may be instructive for countries that, like India, have borders adjacent to maritime routes and a system of governance that divides power between state and central governments. For example, countries such as Australia, Canada and the United States all have maritime borders and a federal system of government, in which actions of states may be an affront to international partners not accustomed to federalism.

Notably, other than some passing references by Chelameswar J and India, the choice by both the judges and the parties to conceptualise the dispute as competing claims to territorial jurisdiction, rather than considering other grounds of extraterritorial jurisdiction, such as active or passive personality or the protective principle,<sup>54</sup> indicates an acceptance of the primacy of territorial jurisdiction and/or a lack of understanding or engagement with the principles of extraterritorial jurisdiction under international law. Notwithstanding that, Italy and India and Kabir CJ all alluded, in their own way, to principles of comity and, as noted above, all accepted the decision in the *Lotus Case* as good law.

## VI CONCLUSION

At the time of writing, the legal and political issues arising out of the *Indian Fishermen Case* have yet to be resolved. Notwithstanding that, the arguments of Italy, India and Kerala and the finding of the Supreme Court of India are still instructive. This is because the decision illustrates the legal and diplomatic complexities in resolving competing claims to jurisdiction. It also suggests that coastal states operating under federal systems need to manage their interactions with foreign nation-states carefully, and that anti-piracy measures may be in need of better management. The decision also engages with some of the more

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<sup>50</sup> Ibid 116 [99].

<sup>51</sup> Ibid 116 [99].

<sup>52</sup> Ibid 117 [99].

<sup>53</sup> Ibid 153 [36].

<sup>54</sup> See generally Danielle Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' (2013) 9 *Utrecht Law Review* 68.



technical aspects of *UNCLOS*, which, if not resolved to the relative satisfaction of both India and Italy, may end up before an international tribunal. While this particular decision is largely concerned with the specific issues of coastal state jurisdiction and with the fallout from anti-piracy operations, the decision points to a broader theme. This theme is that, in an increasingly interconnected world, where individuals have greater mobility and the media cycle is rapid and far-reaching, the international community must continue to navigate its way to a better articulation of legal principles for resolving competing jurisdictional claims.